IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITIONS NO. 55 AND 157 OF 2002.

Writ Petition No. 55/2002.

Shri Esteven D'Souza,
A-12 La Citadel Colony,
Dona Paula,
Panaji – Goa 403002. .... Petitioner.

Versus

1. The Union of India,
   through Commissioner
   of Customs and Central Excise
   Goa, Customs House,
   Panaji – Goa.

2. Customs, Excise and Gold
   (Control) Appellate
   Tribunal, West Regional
   Bench, at Mumbai,
   3rd Floor, PNB House, Sir P.M.
   Road, Fort, Mumbai.

3. Commissioner of Customs
   & Central Excise,
   Customs House, Panaji, Goa.

4. Mamlatdar of Tiswadi,
   Dist. North Goa,
   having his office at
   Collector's Bldg., Panaji, Goa. .... Respondents.

Shri S. N. Sardessai, Advocate for the Petitioner.

Shri E. P. Badrinarayanan for Respondents No.1 and 3.

Writ Petition No. 157/2002.

Shri Thomas D'Souza,
A-12, La Citadel Colony,
Dona Paula,
Panaji, Goa 403002. ..... Petitioner.

Versus.

1. The Union of India,
   through Commissioner
   of Customs and Central Excise
   Goa, Customs House,
   Panaji – Goa.

2. Customs, Excise and Gold
   (Control) Appellate
   Tribunal, West Regional
   Bench, at Mumbai,
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   & Central Excise,
   Customs House, Panaji, Goa.

4. Mamlatdar of Tiswadi,
   Dist. North Goa,
   having his office at
   Collector's Bldg., Panaji, Goa. .... Respondents.

Shri S. N. Sardessai, Advocate for the Petitioner.

Shri E. P. Badrinarayanan for Respondents No.1 and 3.

CORAM: J. N. PATEL, J.

DATE: 14th DECEMBER, 2006.

ORAL JUDGMENT:

These two petitions can be disposed of by a common Judgment and Order as it arises out of the penalty levied on the petitioners pursuant to

the show cause notice dated 13th May, 1985 issued by the Collectorate of Customs and Central Excise, Goa against the petitioners concerning the same transaction and pursuant to which they have been penalized by a common order dated 30.11.1988 concerning the seizure of textiles, video cassettes and old ready made garments valued at Rs. 63,32,940/- (mv) from the residential premises of Shri Yeshwant Vishnu Vete at Morgaon, Banda (Sawantwadi) and seizure of vessels and vehicles.

2. The brief facts leading to initiation of the proceedings against the petitioners were as under :-

Officials of the respondents on 16.11.84 happen to accost one Ramakant who was taken to Customs House, Marmagoa for interrogation. It is at this time that the petitioner Shri Estevam alias Menino D'Souza (in W.P. No.55/02) came to the Customs House and inquired about the said person. His name was disclosed as Ankush Tukaram Chodankar. It is the case of the respondents that on their interrogation it was found that the contraband goods were landed on 15.11.84 in which several persons were involved and insofar as the petitioners were concerned, they were responsible for transhipping the contraband consisting of 195 packages from the Arab dhow in two fishing trawlers viz. 'Shri Ganesh' and 'Virginia Isabel' and the same were brought to Old Goa jetty. From there they were loaded in three trucks by using ferry boats at Old Goa and Diwar with the connivance of the crew of the ferry boats the goods from the trawler were

loaded in the trucks in mid-stream, one by one and were subsequently transported from Marmagoa to the house belonging to one Yeshwant V. Vete and Vishnu Y. Vete and were stored in two rooms of their house at the instance of Shri Mangaldas Kanekar of Banda. During the course of investigation, the Customs officials were able to seize and take over possession of the contraband goods under the panchanama dated 24/25.11.84 under the reasonable belief that the same was liable for confiscation under the Customs Act, 1962. The seized goods were brought to Marmagoa Customs House. They were inventorised in the presence of panchas and assessed to be valued at Rs.63,32,940/-. Further Indian Currency worth Rs.15,000/- came to be seized from the petitioner Shri Estevan @ Menino D'Souza which was part of the advance received from Shri Simplicio Almeida towards the hire of trawlers. It was also seized under a panchanama dated 16.11.84. The Customs officials seized the two trawlers F.T. “Shri Ganesh' and 'V. Isabel' which were used to transport the contraband goods from Arab dhow to Old Goa under a panchanama dated 18.11.84 under the reasonable belief that they were liable for confiscation under the Customs Act, 1962. The Customs officials also carried out search and seizure of the two trucks and in the course of investigation they were also able to round about all the persons who were concerned with the transaction and on interrogating them their statement under S.108 of the Customs Act came to be recorded.

3. The respondents in addition to prosecuting the petitioners and their associates also initiated proceedings against them for confiscation of the property seized from all these persons and for levying penalty for which show cause Notice dated 13.05.85 came to be issued and after necessary inquiry was conducted, the Addl. Collector of Customs and Central Excise passed an order dated 30.11.88 and insofar as the petitioners are concerned, a sum of Rs.2,00,000/- was imposed as penalty on Estevan @ Menino D'Souza and on petitioner Thomas D'Souza a sum of Rs.50,000/- was imposed as penalty under Section 112 of the Customs Act 1962. Indian currency seized from the petitioner Estevan D'Souza was adjusted against the aforesaid personal penalty. This order was based on the finding that in the statement recorded under S.108 of the Customs Act, 1962 both the petitioners have admitted their participation in smuggling of contraband by using the two fishing trawlers for the purpose of transportation of the contraband from the Arab dhow at the high seas to Old Goa jetty and having off-loaded the same in the waiting trucks. It was the case of the petitioners that they have nothing to do with the smuggling of contraband and they have been falsely implicated in the case. They have also challenged having not given any statement as recorded under S.108 of the Customs Act, 1962 and that it was extracted under duress and they were beaten while in customs custody and as such on this ground also their statements are not admissible in addition to other pleas in their defence.

4. The petitioners being aggrieved by the impugned order preferred Customs Appeal No. C/109/89 BOM of 1989 and C/110/89 BOM before the Customs, Excise and Gold (Control) Appellate Tribunal, Bombay. The appeals came to be disposed by Order dated 10.10.01. The Appellate Tribunal concurred with the finding of the Addl. Collector of Customs and Central Excise and dismissed the appeals.

5. Common grounds have been agitated before this Court while assailing the orders passed by the Addl. Collector, Customs and Appellate Tribunal:-

Firstly, that the search and seizure conducted by the respondents/officials were beyond their jurisdiction and therefore the whole proceedings were vitiated.

Secondly, it is submitted that there has been no material placed on record to show that the alleged contraband which came to be seized were foreign goods and in the absence of such proof, the petitioners cannot be penalized and confiscation of their trawlers cannot be justified.

Thirdly, it was contended that the petitioners were not informed under which specific provision they are liable to pay penalty and the impugned order does not specify the provision and clause under which such penalty was levied.

6. It is also contended on behalf of the petitioners that the show

cause notice issued to them was vague for the aforesaid reason and that they were not able to meet the case against them for want of proper show cause notice and further that they were not given any opportunity during the hearing of the matter by the Addl. Collector of Customs and had no opportunity to cross-examine the persons who had examined them under S.108 of the Customs Act came to be afforded and that the whole finding is based mainly on the statement of the petitioners and others recorded under S.108 of the Customs Act and evidence of Mr. Mascarenhas who was the Superintendent of Customs and investigated the case. It is submitted that as the petitioners and all other persons who were being arrested in the case were also prosecuted on various charges relating to the same transaction, but came to be acquitted by the learned Chief Judicial Magistrate, Panaji, for want to sufficient evidence and that the learned Magistrate did not find their statements under S.108 of the Customs Act reliable to reach a conclusion that they were guilty of having committed the offence for which they were charged and prosecuted. It is the case of the petitioners that immediately on getting an opportunity, they have retracted their so called statements recorded under S.108 of the Customs Act and therefore this being the only material against them which was relied upon by the Addl. Collector of Customs, the impugned order of confiscation and levy of penalty cannot be sustained in law.

7. Mr. Badrinarayanan, learned counsel appearing for the respondents

submitted that the Court will have to appreciate the distinction between the degree of proof required in a criminal trial and in proceedings initiated under the Customs Act for fastening the liability of penalty and confiscation of vessels on the persons involved in smuggling of contraband. It is submitted that the petitioners cannot take benefit of the fact that they were tried and acquitted in a criminal trial and therefore they are not liable to pay any penalty and their vessels deserve to be released as these are two distinct proceedings and consideration for holding the accused guilty of having committed offence under the Customs Act and for levying penalty and passing confiscation order required different degree of proof and as the material placed before the Addl. Collector of Customs satisfactorily established the complicity of Petitioners, there is no merits in their case.

8. In reply to the contention of the learned counsel of the petitioners, the Customs officials from Goa had no jurisdiction to levy penalty on the petitioners, mainly on the fact that the contraband came to be seized in Sawantwadi in State of Maharashtra. It is submitted that as the contraband were smuggled on the shores of Goa which were brought in the fishing trawlers by the petitioners from an Arab dhow and loaded in trucks which was subsequently found and seized at Sawant Wadi in no manner take the case beyond the jurisdiction of the Customs Officials from Goa.

9. The learned counsel for the parties for that purpose placed reliance

on the Notification regarding appointment of officials of the Customs and their jurisdiction and according to the said Notification for the purpose of territory of Goa, Daman and Diu, the designation of officers is Collectorate of Customs, Bombay, Deputy Collector of Customs, Goa and Assistant Collector of Customs, Goa and as the contraband was found within the territory of Maharashtra, it was within the jurisdiction of the Collector of Customs, Bombay and all other officials of Bombay who have jurisdiction over Maharashtra and therefore, if at all, the proceedings were to be initiated, it ought to have been at the behest of Customs officials posted in the State of Maharashtra and not by Customs officials of Goa. For the said purpose, reliance is placed on the decision of the Supreme Court in the case of ***Union of India and others v. Ram Narain Bishwanath and others (1998) 9 S.C.C. 285***. This was a case where the Supreme Court held that seizure and confiscation under Sections 110, 111(d), 122 and 5 of the Customs Act, 1962 stands vitiated for want of territorial jurisdiction as in the aforesaid case goods were cleared at Paradip port in the State of Orissa and transported to Howrah in the State of West Bengal which was suspected of being imported on fictitious licences. Therefore the Supreme Court held in such circumstances jurisdiction to seizure of confiscation of goods vested with the Customs authorities at Paradip and not those in West Bengal and therefore it is contended that as the goods were seized at Banda in Sawantwadi which is situated in the State of Maharashtra, the whole proceedings initiated by Customs Authorities of Goa stands vitiated.

Insofar as the issue of jurisdiction raised by the petitioners is concerned, it has no merit for the very reason that it is not the case of the respondents that the goods landed in State of Maharashtra. On the other hand, it is a very specific case that the contraband goods which were admittedly seized from a godown at Banda in Sawantwadi belonging to one Vete were actually brought in an Arab dhow and the landing took place at the high seas from where it was brought in fishing trawlers of the petitioners to old jetty in Old Goa and from fishing trawlers they were transferred in trucks and transported to Sawantwadi.

10. As regards the show cause notice issued to the petitioners is concerned, with the able assistance of the learned counsel for the petitioners as well as the learned counsel for the respondents, the Court has gone through the show cause notice and it cannot be gainsaid that the show cause notice was vague and there is no mention of the specific provisions under which it was proposed to levy penalty on the show cause notice which deprived the petitioners to meet the case of the respondents and therefore reliance placed by the learned counsel for the petitioners on the case of ***B. Lakshmichand v. Government of India [1983 E.L.T. 322 (Mad.)]***decided by learned Single Judge of the Madras High Court does not come to the rescue of the petitioners, as in the said case, there was no specific reference to clauses of Section 112 of Customs Act and the Court held that the proceedings should not be allowed on vague and camouflaged hypothesis

and prejudice must be presumed to have been caused to the accused in those circumstances and as in the said case the authorities were not very clear as to whether clause (a) or clause (b) of S.112 would apply, the proceedings came to be quashed which is not the case here.

11. The third contention which has been raised before this Court is that the petitioners were not given a fair opportunity to contest the inquiry proceedings pursuant to the show cause notice issued to them as they were not given any opportunity to cross-examine the persons who recorded their statements under S.108 of the Customs Act, which was according to them obtained under duress and were retracted. The learned counsel for the petitioners, in support of their contentions have placed reliance on the case of ***Dhirajlal Amritlal Mehta v. Union of India [1982 E.L.T. 273 (Bom.)]*** which is a decision of a Single Judge of the Bombay High Court. In Dhirajlal Mehta's case this Court observed that in a case where the Department is basing their claim on statement recorded under S.108 of the Customs Act, it was obligatory on the part of the Customs Department to examine the officer who recorded the statement in confiscation proceedings to establish the statements were voluntary and that inspite of the consistent pleadings of the petitioner, the statements were secured and the Department did not bother to examine the officer who had recorded the statement to establish that they were voluntary in nature; therefore the proceedings deserve to be quashed on this count as in the present case. It has been

pointed out by Mr. Badrinarayanan, learned counsel appearing for the respondents that the impugned order itself discloses that Mr. Mascarenhas who was Superintendent of Customs at the relevant time and investigating Officer was examined by the Department and cross-examined by the petitioners. It is submitted that as Mr. Mascarenhas has interrogated the petitioners and on such interrogation, statement came to be recorded by the officers who were assisting him in the investigation and as the statements came to be recorded on the basis of the interrogation, examination of Mr. Mascarenhas as a witness was sufficient in the given facts and circumstances of the case as the officers who have scribed the statements are not the officers to whom the confessional statements were made, but it was made to Mr. Mascarenhas who got it recorded through his officers, which findings have been confirmed by the Appellate Tribunal.

12. If one examines the impugned order, both the authorities have dealt with this issue and found that in the cross-examination of Mr. Mascarenhas, nothing was brought on record to justify the plea taken by the petitioners that the statements came to be recorded under duress or coercion. On the other hand, it has been further clarified that the petitioners and others were never in custody of the Customs Department so as to coerce them into making a statement by illegal means. On the other hand what has come on record is so far as the petitioner Estevan D'Souza is concerned, he rather went to the Customs Department on his own in search of one of his

crew members who was accosted by the Customs officers on suspicion and on their interrogation it was revealed to the Customs officials that landing of contraband goods have taken place at Goa and that the goods have been transported to the godown of Vete at Banda in Sawantwadi and thereafter all the concerned persons were summoned and interrogated and their statements came to be recorded. The fact also stands corroborated by the search and seizure of the contraband goods.

13. Therefore, on considering the facts placed on record, this Court is of the view that there is sufficient material brought on record by the Customs officials to show that the petitioners have aided and abetted the smuggling of contraband goods by transporting the same in their trawlers from high seas to Old Goa jetty which fact has been duly established not only by the statement under S.108 of the Customs Act, but also by statements made by other persons involved in the transaction and leading to search and seizure of the contraband goods.

14. One of the contentions which is made before this Court is that the petitioners cannot be held liable to pay the penalty unless it is established that the contraband goods were of foreign origin and that mainly the mark on the goods, particularly the cloth having made in Japan cannot lead to an inference that they were smuggled goods. It appears that this issue is being raised by the petitioners for the first time in this Court and even if so, the

manner in which the contraband goods have been brought and landed at the Goa coast, sufficiently discharges the burden on the part of the Customs officials to show that they were foreign goods which were brought in a clandestine manner and therefore the onus would shift on the petitioners to show that they were not concerned with the contraband goods in any manner whatsoever or that they were not of foreign origin. Nothing prevented the petitioners from applying to the officials to send the sample of the contraband to the laboratory for testing to ascertain whether they were foreign goods or not and therefore this also does not in any manner affect the findings of the authorities. Further the plea raised by them in their defence is of total denial.

15. There is no reason why this Court should not accept the concurrent finding of facts arrived at by the two authorities below and therefore this Court finds that there is no merit in the challenge made by the petitioners.

16. The learned counsel for the petitioners submitted that the case of the petitioners can be considered by taking a lenient view considering the passage of time and the loss suffered by them in confiscation of their trawlers and therefore whatever has been recovered from them as penalty would suffice and meet the ends of justice. This Court finds that the Addl. Collector of Customs on taking into consideration the involvement of several persons in the transaction, has taken this fact into consideration and

has levied the penalty in proportion to their involvement. This does not call for any interference.

17. An attempt was made before this Court to demonstrate that the Customs officials having failed to nab the real culprits i.e. Arab dhow which smuggled the contraband and the prime suspects in the case have not been arrested, the case of the petitioners deserves to be sympathetically considered. Such a plea cannot be accepted.

18. The petitions are therefore devoid of merit and are dismissed with no order as to costs.

J. N. PATEL, J.

sl.